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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

LOYAL PROTECTIVE LIFE INSURANCE COMPANY,
Petitioner,

v.

MONARCH LIFE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MONARCH LIFE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Loyal Protective Life Insurance Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on December 19, 1963, reversing the judgment of dismissal of the United States District Court for the Southern District of New York.

Opinions Below.

The opinion of the District Court, printed at pages A1-A17 of Appendix A, is reported in 217 F. Supp. 210. The opinion of the Court of Appeals for the Second Circuit is unreported and is printed at pages B2-B10 of Appendix B.

Jurisdiction.

The judgment of the Court of Appeals, printed at page B1 of Appendix B, was entered on December 19, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented.

The basic issue here presented is whether in view of the McCarran-Ferguson Act (McCarran Act; 15 U. S. C. §§ 1011-1014, Appendix C, pp. C2-C3) the private treble damage remedy is available in cases involving "boycotts" in the business of insurance.

Prior to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n.*, 322 U. S. 533 (1944), it was thought that the insurance business was not subject to the provisions of the Federal antitrust laws (and, *a fortiori*, not subject to private treble damage actions). See *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 414 (1946). In *South-Eastern Underwriters*, however, this Court held that the Federal antitrust laws did apply to insurance. That case involved the sufficiency of an indictment charging the defendant Association and its members with boycotts and other types of coercion and intimidation to compel persons who needed insurance to buy only from members of the Association on the Association's terms. The indictment charged that companies not members of the Association were cut off from the opportunity to re-insure their risks; that independent sales agencies who represented non-Association members were punished by a withdrawal of the right to represent members of the Association; and that persons needing insurance who purchased from non-Association companies were threatened with boycotts and withdrawal of all patronage.

In order to meet the situation created by the decision of this Court in *South-Eastern Underwriters*, and restore the regulation of insurance to the States, Congress in 1945 passed the McCarran Act.

At the time of the enactment of the McCarran Act, Section 4 of the Clayton Act was the standard statutory authority for treble damage actions, a fact of which Congress was well aware. See H. R. Rep. No. 422, 84th Cong., 1st Sess., p. 2 (1955); Appendix A, p. A13. However,

Section 7 of the Sherman Act, which provided a treble damage remedy for violations of that Act, continued to exist on the books.

In Section 2(b) of the McCarran Act (15 U. S. C. §10.12[b]) Congress expressly immunized the insurance business from the provisions of the Sherman, Clayton and Federal Trade Commission Acts where state regulation of insurance exists, except for the limited exception set forth in Section 3(b) of the Act (15 U. S. C. § 1013[b]). There is no question but that a comprehensive system of insurance regulation exists in New York. § 340, New York Business Law; New York Insurance Law. Section 3(b) of the McCarran Act provided that "the said Sherman Act" alone should continue to be applicable to agreements to boycott, coerce, or intimidate and to acts of boycott, coercion and intimidation. In the debates in the House and Senate no mention was made of the private treble damage remedy and Senator O'Mahoney, a Senate conferee on the Bill, when asked to explain the meaning of Section 3(b), said that this Section would permit the *Federal Government* to continue to indict and prosecute any agreement or act of boycott (as it had in *South-Eastern Underwriters*). 91 Cong. Rec. 1487 (1945); see p. 15, *infra*.

Section 7 of the Sherman Act was formally repealed in 1955 (69 Stat. 283, Appendix C, p. C3).

Thus, the specific questions presented are:

(1) Whether the treble damage remedy is available to private litigants for agreements or acts of boycott in the business of insurance in view of the express language of the McCarran Act and the repeal of Section 7 of the Sherman Act in 1955.

(2) Whether Congress in enacting the McCarran Act intended to afford private litigants, in cases involving boycotts in the business of insurance, the treble damage remedy provided by Section 4 of the Clayton Act.

Statutes Involved.

The statutory provisions involved are Section 1 of the Sherman Act, 15 U. S. C. § 1, Section 7 of the Sherman Act, 26 Stat. 210, the Act repealing Section 7 of the Sherman Act, 69 Stat. 283, Section 4 of the Clayton Act, 15 U. S. C. § 15, Sections 1-4 of the McCarran-Ferguson Act, 15 U. S. C. §§ 1011-1014, and § 340, New York General Business Law. They are printed in Appendix C, pp. C1-C5.

Statement

(a) The Complaint.

In this case, the complaint (Record, pp. 24a-32a) alleges a conspiracy between petitioner, Loyal Protective Life Insurance Company (hereafter "Loyal"), and Lindop, a former general agent of Monarch Life Insurance Company (hereafter "Monarch"), who had been discharged by Monarch, and thereafter employed by Loyal, to "boycott" Monarch in the sale of health and accident insurance by inducing a number of Monarch agents to leave Monarch's employ and join Loyal and by inducing former policyholders of Monarch to transfer their business to Loyal.[1] It is alleged that the conspiracy had its inception

[1] On the motion in the District Court, counsel for Loyal stated that Monarch's claim that the activities alleged in the complaint amounted to a "boycott" would be challenged at an appropriate time, but that Loyal at this juncture of the proceeding would not address itself to the merits of the complaint. (See affidavit of Donald M. Dunn, sworn to December 12, 1962, Record, p. 35a.) This Court's attention is respectfully directed to the fact that the label "boycott" appears to have been employed by Monarch solely in an attempt to bring this case within the provisions of the McCarran Act and that in actuality the acts alleged to constitute a boycott do not amount to a boycott in the sense in which that term is used in the McCarran Act in the light of the *South-Eastern Underwriters* case which led to its passage. See p. 2, *supra*.

in 1958[2] and was carried out "in whole or in part" in the Southern District of New York. The complaint alleges that jurisdiction is based on Section 3(b) of the McCarran Act and Section 4 of the Clayton Act.

The same allegations, without the "boycott" label, were made by Monarch in two other still pending actions: one as a counterclaim in an action in the United States District Court for the Southern District of New York brought by Lindop against Monarch for termination commissions, and the other by Monarch in a State Court action instituted by it against Lindop and Loyal. In July, 1962 Monarch as defendant in the former action moved in the District Court to amend its counterclaim by asserting the identical claims set forth in the complaint herein ("boycott", treble damages and "reasonable" attorneys' fees) as an additional counterclaim in that action. The motion was denied by Chief Judge Ryan by order dated July 18, 1962 on the ground that the application was belated and untimely, and that there was no logical relation between the complaint in the Lindop action and the antitrust claim attempted to be inserted as an additional counterclaim (see affidavit of Donald M. Dunn, sworn to December 12, 1962, Record, p. 36a).

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[2] In 1958 Monarch became affiliated with the Springfield Fire and Marine Insurance Company and this relationship continued through the end of 1962. The Monarch-Springfield complex of insurance companies was approximately ten times the size of Loyal as can be seen from the following figures:

	Monarch Springfield		Loyal	
	Net Assets	Premium Earned	Net Assets	Premium Earned
1962*	$298,220,828	$131,808,004	$40,535,055	$11,395,500
1961	298,504,327	126,491,135	37,689,879	10,677,636
1960	265,862,003	109,872,783	34,807,304	9,849,529
1959	238,621,005	96,647,520	32,363,660	9,013,919
1958	222,864,403	93,453,935	30,069,107	8,226,717

*All figures and information regarding Monarch and Loyal have been obtained from Moody's Bank and Finance Manual for the appropriate years.

(b) The Opinion of the District Court.

In the District Court, Loyal moved to dismiss the action for lack of jurisdiction over the subject matter upon the ground that Section 3(b) of the McCarran Act did not permit a private treble damage action provided for by Section 4 of the Clayton Act and that Section 7 of the Sherman Act (the treble damage remedy provided in the Sherman Act) was expressly repealed before the cause of action arose (Record, pp. 32a-37a). The motion was granted by District Judge Levet and judgment was entered dismissing the action for lack of such jurisdiction (Record, p. 7a).

The District Court recognized the special nature of the business of insurance and the efforts of Congress to render it immune from Federal regulation, and particularly the antitrust laws, by the passage of the McCarran Act (Appendix A, pp. A2-A4). The Court specifically noted that in view of New York's regulation of the business of insurance through the New York Insurance Law and Section 340 of the New York General Business Law (Appendix C, pp. C4-C5), Section 2(b) of the McCarran Act has effected "the pro tanto repeal of the Sherman, Clayton and Federal Trade Commission Acts provided for in Section 2(b)" and thus "is effective in New York and applicable to this case, subject only to the exceptions specified in Section 3(b) of the Act" (Appendix A, pp. A4-A5).

The District Court held that in enacting Section 3(b) Congress did not intend to "adopt" the Sherman Act as it read in 1945 so as to give "to Section 7 [of the Sherman Act] post-repeal efficacy"[3] and that the repeal of Section 7

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[3] Monarch's principal argument before the District Court related to this "adoption" theory, but on appeal to the Court of Appeals this contention was all but abandoned.

in 1955 eliminated the private treble damage remedy for acts of boycott (Appendix A, pp. A6-A12)[4].

The District Court also rejected Monarch's argument based upon the availability of the treble damage remedy provided under Section 4 of the Clayton Act. It held that if Monarch's "construction were to be followed it would necessitate this court to judicially amend Section 3(b) to include the Clayton Act. Such a judicial rewriting is clearly not warranted" (Appendix A, p. A13).

The Court noted that this construction of the McCarran Act does not render Section 3(b) of the McCarran Act meaningless. The Federal Government has continued to prosecute "both civil and criminal actions for acts of boycott, coercion and intimidation in the insurance industry under Sections 1, 2 and 4 of the Sherman Act, 15 U. S. C. §§ 1, 2, 4" (Appendix A, p. A11). The cases[5] cited by the Court to show the continuing validity of Section 3(b) involved actions by the government against associations of agents conducting themselves in a manner similar to the

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[4] The District Court referred to the fact that it was in disagreement with the only other case dealing with this question, *Professional & Businessmen's Life Ins. Co.* v. *Bankers Life Co.*, 163 F. Supp. 274 (D. Mont. 1958), but noted that that case differed from the one at bar (Appendix A, p. A11). In *Professional & Businessmen's Life Ins. Co.* the Court initially held that Section 7 of the Sherman Act which "has never been repealed" permitted the plaintiff in that case to maintain its treble damage action (163 F. Supp. at 283). When later the Court's attention was called to the fact that Section 7 of the Sherman Act had been repealed, it thereupon found that there had been an "adoption" of the Sherman Act by the McCarran Act, but went on to say that, even if its holding were incorrect, the plaintiff could still maintain the action since some of the acts complained of occurred prior to the repeal of Section 7 (163 F. Supp. at 293-295). *The Court there expressly held that there was no jurisdiction under any provision of the Clayton Act* (163 F. Supp. at 295) *and in that respect agreed with the District Court here.*

[5] *United States* v. *Insurance Board of Cleveland*, 144 F. Supp. 684 (N.D. Ohio 1956) (boycotts) and 188 F. Supp. 949 (N.D. Ohio 1960) (coercion and boycott); *United States* v. *New Orleans Insurance Exchange*, 148 F. Supp. 915 (E. D. La. 1957) (boycotts), aff'd 355 U. S. 22 (1957).

"combinations of insurance companies" found in *South-Eastern Underwriters* (see p. 2, *supra*).

(c) The Opinion of the Court of Appeals.

In its opinion the Court of Appeals conceded that by its "literal wording" Section 3(b) of the McCarran Act saved only the Sherman Act from non-applicability where state regulation exists; that upon repeal of Section 7 of that Act in 1955 the Sherman Act no longer provided for private treble damage actions; and that "the Clayton Act, upon which Monarch must depend for its treble-damage remedy, is, in the terms of § 2(b), applicable only 'to the extent that (the business of insurance) is not regulated by state law'" (Appendix B, pp. B5-B6).

Notwithstanding this and disregarding the express language of the McCarran Act, the Court referred to portions of the Congressional debate in which it was said that the Act would not interfere with the application of the Sherman Act to agreements or acts of boycott, coercion or intimidation and concluded that this manifested a Congressional purpose that "the federal policy" expressed through the Sherman Act "was to be preeminent" where boycotts or agreements to boycott were concerned (Appendix B, p. B6). Following this, the Court then arrived at the unwarranted conclusion that since the private treble damage remedy occupied such a fundamental role in the "general pattern of antitrust law enforcement", "[i]n the absence of any articulated suggestion" that Congress "intended to *abandon*" (emphasis supplied) the Clayton Act treble damage remedy, that remedy must be deemed to be included in Section 3(b) of the McCarran Act (Appendix B, pp. B7-B8).

The Court of Appeals also said that it could not adopt an interpretation of Section 3(b) "which flies in the face of the meaning intended by Congress" and that since the Clayton Act treble damage remedy was "so basic to the

enforcement of the Sherman Act", it felt that the interpretation adopted by the District Court would severely hamper the applicability of the Sherman Act to boycotts (Appendix B, p. B9).

It concluded by holding that all boycotts or agreements to boycott condemned by the Sherman Act "are rendered subject to federal law" and that the treble damage provision of the Clayton Act, being "a significant part of that law", remained applicable to all such conduct (Appendix B, pp. B9-B10).

Reasons for Granting the Writ.

The Court of Appeals, in holding that Section 3(b) of the McCarran Act must be deemed to include the private treble damage remedy provided by Section 4 of the Clayton Act, indulged in judicial legislation in violation of fundamental canons of statutory construction. It disregarded the expressed intention of Congress to place the business of insurance in the control of the States and to remove that business from the purview of the three Federal trade regulation acts—the Sherman Act, the Clayton Act and the Federal Trade Commission Act—except for the limited exception provided by Section 3(b) of the McCarran Act. It failed to take cognizance of the principle that such limited exceptions are to be strictly construed.

Furthermore, in purporting to ascertain the intention of Congress, the Court of Appeals held that, since Congress gave no indication that it "intended to abandon" the treble damage remedy provided by Section 4 of the Clayton Act, an intention to include that remedy within the orbit of Section 3(b) of the McCarran Act must be inferred. This is not the question. The question is whether Congress intended to adopt the treble damage remedy of Section 4 of the Clayton Act for application to the business of insurance when it passed the McCarran Act—not whether it "intended to abandon" that remedy (which it had already eliminated by the provisions of Section 2[b] of the Mc-

Carran Act). The language of the entire Act clearly negatives any suggestion that Congress intended to afford private litigants such a remedy—even in 1945 before Section 7 of the Sherman Act was repealed. The same conclusion follows from reading the reports accompanying the bill as well as from the debates on the floor of Congress. In any event, the Congressional history is wholly lacking in the required persuasive evidence of an intent to provide such a remedy and to assume that intent requires a distortion of the plain language of Section 3(b) of the McCarran Act by reading into it the treble damage provisions of Section 4 of the Clayton Act.

1.(a). The clear language of the McCarran Act (Appendix C, pp. C2-C3) excludes private treble damage actions. The Act was passed primarily to restore regulation of insurance to the States free from obstructions created by Federal legislation. *Prudential Ins. Co.* v. *Benjamin*, *supra*, 328 U. S. at 429-430.

Section 2(b) of the Act (Appendix C, pp. C2-C3) specifically exempted insurance from the applicability of the Sherman, Clayton, and Federal Trade Commission Acts. The only exception was set forth in Section 3(b) (Appendix C, p. C3) which provided that "*said* Sherman Act" (emphasis supplied) should continue to be applicable to agreements or acts of boycott, coercion or intimidation. The treble damage remedy provided by Section 4 of the Clayton Act (Appendix C, p. C2) was thus specifically excluded from the exception. Section 7 of the Sherman Act (Appendix C, p. C2), although no longer codified in the U. S. Code as part of the Sherman Act, continued on the books until 1955 when it was repealed (Appendix C, p. C3).

Assuming that prior to 1955 the treble damage action under the Sherman Act was permitted by Section 3(b), certainly after repeal of Section 7 of the Sherman Act, the plain language of the McCarran Act prohibited treble damage actions even when based upon boycott, coercion or

intimidation in the business of insurance. Thus, this case offers a classic example for the application of the rule of construction that "where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it." *Hamilton v. Rathbone*, 175 U. S. 414, 419 (1899). Or, as a later Court put it, "It is elementary that where no ambiguity exists there is no room for construction." *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, 277 (1929).

In essence, the Court below has held that Congress did not mean what it said and that the limited exception provided for by Section 3(b) shall be amended by judicial construction to read "Nothing contained in this chapter shall render the said Sherman Act *or Section 4 of the Clayton Act* inapplicable" to agreements or acts of boycott. The reading in of the words *"or Section 4 of the Clayton Act"* is not permissible, in the absence of a clear showing that Congress so intended. This is particularly true where the question involves the jurisdiction of the District Court, a court of limited jurisdiction where the "fair presumption is * * * that a cause is without its jurisdiction until the contrary appears." *Turner v. Bank of North America*, 4 U. S. (Dall.) 8, 11 (1799); see also *Glidden Company v. Zdanok*, 370 U. S. 530, 551 (1962); *Lockerty v. Phillips*, 319 U. S. 182, 187 (1943); *Kline v. Burke Constr. Co.*, 260 U. S. 226, 234 (1922); *Birmingham Post Company v. Brown*, 217 F. 2d 127, 130 (5th Cir. 1954). As we shall show later pp. 14-16, *infra*), no such purpose or intent can be attributed to Congress and the evidence available points to a contrary conclusion.

In the absence of such showing of Congressional intent, this Court has consistently refused to extend the application of a statute by additions or deletions. *62 Cases of Jam v. United States*, 340 U. S. 593, 596 (1951) ("* * * our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to

delete nor to distort."); *United States* v. *Cooper Corp.*, 312 U. S. 600, 605 (1941) ("* * * it is not our function to engraft on a statute additions which we think the legislature logically might or should have made"); cf. *Border Pipeline Co.* v. *Federal Power Commission*, 171 F. 2d 149, 152 (D. C. Cir. 1948) (a Court "cannot write into an act of Congress a provision which Congress affirmatively omitted").

Another reason why Section 4 of the Clayton Act may not be read into Section 3(b) of the McCarran Act is found in the language of the first portion of Section 2(b) of the McCarran Act (Appendix C, pp. C2-C3) and the provisions of Section 340 of the New York General Business Law (Appendix C, pp. C4-C5). Section 2(b) of the McCarran Act provides that no Act of Congress shall be construed to "supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance". Section 340 of the New York General Business Law provides that every contract, agreement, arrangement or combination in restraint of competition is illegal and void. The Act specifically applies to the insurance industry and violations of the Act are subject to civil suits for damages. § 340-2, § 340-5, New York General Business Law; *Rourke* v. *Elk Drug Co.*, 75 App. Div. 145 (3rd Dept. 1902); *Dunkel* v. *McDonald*, 272 App. Div. 267 (1st Dept. 1947), aff'd 298 N. Y. 586 (1948). Furthermore, agreements or acts of boycott constitute a violation of Section 340. *People* v. *Masiello*, 177 Misc. 608 (Sup. Ct. N. Y. Co. 1941), aff'd 271 App. Div. 875 (1st Dept. 1946). Thus, New York has provided a civil remedy for agreements or acts of boycott in the insurance industry and under the clear language of Section 2(b) of the McCarran Act Section 4 of the Clayton Act cannot be deemed to "supersede" the New York law on this subject since the Clayton Act is not a statute which "specifically relates to the business of insurance".

(b). Section 3(b) carved out a limited exception to the general immunity granted by Section 2(b) by providing that nothing in the Act should render "said Sherman Act" inapplicable to agreements or acts of boycott. Such a limited exception must be strictly construed and Monarch had the burden of establishing that it came within such exception. *United States* v. *Dickson*, 40 U. S. (15 Peters) 141, 165 (1841); *Schlemmer* v. *Buffalo, Rochester &c. Ry.*, 205 U. S. 1, 10 (1907); *Canadian Pac. Ry. Co.* v. *United States*, 73 F. 2d 831, 834 (9th Cir. 1934).

Where, as here, a proviso delineates a specific exception to the general language of an act, a court is not at liberty to infer that Congress intended to provide for additional exceptions. *Phillips, Inc.* v. *Walling*, 324 U. S. 490 (1945). In such situations, the courts have often pointed out that the legislature itself could easily have expressed the additional exception if it had intended it. See, e.g., *United States* v. *Chase*, 135 U. S. 255, 259 (1890); *Union Nat. Bank* v. *Matthews*, 98 U. S. 621, 627 (1879); *United States* v. *Obermeier*, 186 F. 2d 243, 255 (2d Cir. 1950).

This Court early recognized the McCarran Act as expressing the purpose of Congress to "put the full weight of its power behind existing and future state legislation" in the area of the business of insurance to the "extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for." *Prudential Ins. Co. v. Benjamin, supra*, 328 U. S. at 431.

Since the only treble damage remedy permitted by the express terms of the McCarran Act was that afforded by Section 7 of the Sherman Act -- and Section 7 was repealed before Monarch's cause of action arose — Monarch failed to bring itself within the limited exception granted by Section 3(b).

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[6] Furthermore, the treble damage action, which was unknown to the common law (*Shotkin* v. *General Electric Co.*, 171 F. 2d 236, 238 [10th Cir. 1948]), is a drastic remedy and one not lightly to be inferred. *Westor Theatres* v. *Warner Bros. Pictures*, 41 F. Supp. 757, 762 (D. N. J. 1941).

2.(a). At the time of the enactment of the McCarran Act in 1945 Congress must be presumed to have known that Section 7 of the Sherman Act had become a dead letter and that the private treble damage remedy therein provided had been superseded by Section 4 of the Clayton Act (see pp. 2-3, *supra*). In the light of this, and the fact that the Clayton Act was made inapplicable by Section 2(b), the failure of Congress to refer to the Clayton Act in Section 3(b) becomes even more significant and indicates that even prior to the repeal of Section 7 of the Sherman Act in 1955 Congress had no intention of affording private litigants treble damages for acts or agreements of boycott in the insurance business under any circumstances.

As we have noted (p. 10, *supra*), in the first portion of the McCarran Act Congress clearly expressed its intention to return the regulation of insurance to the States. Thus Section 2(b) immunized insurance from the provisions of the Clayton and Federal Trade Commission Acts, as well as the Sherman Act, in States where such regulation exists. The exception contained in Section 3(b) continued the applicability of the Sherman Act alone to acts or agreements of boycott and Congress expressly refrained from mentioning the Federal Trade Commission Act (Section 5[a] of which empowers the Federal Trade Commission to prosecute boycotts as an "unfair method of competition")[7], as well as the Clayton Act (Section 4 of which provides the private treble damage remedy most frequently used at that time), although both Acts had been specifically referred to in Section 2(b).

(b). The Court of Appeals completely misconstrued the intention of Congress as set forth in the reports accom-

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[7] *Fashion Guild* v. *Trade Comm'n.*, 312 U. S. 457, 463-465 (1941).

panying the bill and in the statements made on the floor of Congress. No mention of the treble damage remedy for acts of boycott appears in the Congressional record. The Court failed to note that both the Senate and House Reports stated that the purpose of Section 3(b) was to permit the "Sherman Act" to remain applicable to acts of boycott, coercion or intimidation. H. R. Rep. No. 143, 79th Cong., 1st Sess., p. 3 (1945); S. Rep. No. 20, 79th Cong., 1st Sess., p. 3 (1945). It similarly failed to note that Senator O'Mahoney, a Senate conferee on the bill, in explaining the language of Section 3(b), stated:

> "My interpretation of the language which I have just read—and I am sure that all other conferees are in agreement—is *that it would permit the Federal Government to continue to indict and prosecute any person or any group for any agreement or act of boycott*, intimidation or coercion, in the past or future." 91 Cong. Rec. 1487 (1945). (Emphasis supplied.)*

In any event, the Congressional history fails to disclose any "persuasive evidence" of an intent other than that contained in the explicit language of Section 3(b). Cf. *Boston Sand & Gravel Co.* v. *United States*, 278 U. S. 41, 48 (1928).

(c). The conclusion of the Court of Appeals that somehow or other Congress must have intended to provide the treble damage remedy for acts of boycott cannot be reconciled with the language Congress employed in Sections 1 and 2(a) of the McCarran Act. Congress was so intent upon restoring full regulation and control of the business

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* Thus, it is clear that the sponsors of the bill had in mind the right of the Federal Government to move against combinations of insurers that boycott, coerce or intimidate other insurers and purchasers of insurance in situations similar to those involved in *South-Eastern Underwriters*.

of insurance to the States and upon forestalling any limiting interpretation of its purpose that, by the McCarran Act, it specifically declared that "continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." (15 U. S. C. § 1011, Appendix C, p. C2.) Congress further declared that "the business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." (15 U. S. C. § 1012[a], Appendix C, p. C2.)

It would be difficult to express more forcefully the intent of Congress to forestall any extension of Federal regulation of the business of insurance beyond that specifically reserved in Section 3(b) of the McCarran Act. Yet here the Court of Appeals, by an extraordinary *tour de force*, has read into Section 3(b) of the McCarran Act (despite the eloquent "silence" of Congress) an intent of Congress to subject the business of insurance to Section 4 of the Clayton Act in addition to the Sherman Act which alone was reserved by the express language of Section 3(b). The Court attempted to justify this flouting of expressed Congressional intent (see *Prudential Ins. Co.* v. *Benjamin*, *supra*, 328 U. S. at 433) by indulging in the unwarranted assumption that Congress *could* not have intended to enact what it unmistakably did enact, viz.: that of the several antitrust laws, including the Clayton Act, only the Sherman Act should continue to be applicable to the business of insurance and then only to the limited extent specified.

"3. The business of insurance affects practically every citizen of the United States. At the close of 1961 the total coverage of life insurance in the United States alone exceeded 629 billion dollars[9]. This Court in *South-Eastern*

[9] *Life Insurance Fact Book — 1962*, p. 12 (Institute of Life Insurance Companies).

Underwriters described the insurance industry as "one of the largest and most important branches of commerce". 322 U. S. at 540.

In addition to the case at bar, there is now pending in the United States District Court for the District of Kansas[10] an action involving the right to treble damages under Section 3(b) of the McCarran Act where the defendants include some of the largest insurance companies in the United States. Undoubtedly there will be other similar litigation in the future. Under these circumstances, it would appear desirable to have the authoritative guidance and definitive ruling of this Court on the very important question as to whether, in view of the McCarran Act, private litigants are entitled to maintain actions for treble damages for acts of boycott occurring in the business of insurance.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: January 29, 1964.

Respectfully submitted,

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[10] *Green Shield Life Insurance Company v. Wichita General Agents and Managers Association, Inc., et al.*, Civil Action No. W-2502.

APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MONARCH LIFE INSURANCE COMPANY, *Plaintiff,* *against* LOYAL PROTECTIVE LIFE INSURANCE COMPANY, *Defendant.*	62 Civ. 3560 OPINION

APPEARANCES:

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LEVET, D. J.

The defendant, Loyal Protective Life Insurance Company (Loyal), moves pursuant to Rule 12(b), Fed. R. Civ. P., to dismiss this action for lack of jurisdiction of the subject matter.

The complaint seeks treble damages from the defendant for the latter's violation of Section 1 of the Sherman Act, 15 USC § 1. It alleges that both the plaintiff and the

defendant are Massachusetts insurance companies licensed to and doing business in the State of New York; that both are in competition in the sale of accident and health insurance in interstate commerce throughout the United States; and that the defendant and a former general agent of the plaintiff conspired to illegally eliminate, restrain and boycott the plaintiff. Jurisdiction is alleged on the existence of a federal question and the amount in controversy, 28 USC §§ 1331 and 1337; Section 4 of the Clayton Act, 15 USC § 15, and Section 3(b) of the McCarran Ferguson Act, 15 USC § 1013(b).

A brief history of the statutory background is necessary to give a setting to the jurisdictional question posed. As part of the original Sherman Act, Congress enacted in 1890 Section 7 (26 Stat. 210), which provided jurisdiction and venue for private treble damage actions for violations of the Sherman Act. Thereafter, in 1914, Congress enacted the Clayton Act (38 Stat. 730) "[t]o supplement existing laws against unlawful restraints and monopolies, and for other purposes." Section 4 of that Act (38 Stat. 731) provided "[t]hat any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Prior to 1944, the Supreme Court had held that the issuance of an insurance policy was not commerce (*Paul* v. *Virginia*, 8 Wall. 168 (1868); *Hooper* v. *California*, 155 U. S. 648, 654-55 (1895); *New York Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495, 503-04 (1913)), and the several states retained the sole authority to regulate the insurance industry (see *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 414-16 (1946)).

However, in 1944, the Supreme Court in *United States* v. *Southeastern Underwriters Ass'n*, 322 U. S. 533, decided that a fire insurance company which conducted a substantial part of its business across state lines is engaged in "commerce among the several states" and subject to regulations by Congress under the Commerce Clause (*id.* at 539) and that Congress did not intend that the business of insurance should be exempt from the operation of the Sherman Act (*id.* at 553, 560).

In response to that decision, Congress in 1945 passed an Act, "to express the intent of the Congress with reference to the regulation of the business of insurance" (59 Stat. 33 (1945), 15 USC §§ 1011-15, hereinafter the "McCarran Act"), which provided in part:

> "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states [15 USC § 1011].
>
> "Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> "(b) No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that

such business is not regulated by State law [15 USC § 1012].

"Sec. 3. (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

"(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation [15 USC § 1013].

"Sec. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920 [15 USC § 1014]."[1]

Under Section 2(b) of the McCarran Act Congress specifically provided that the Sherman Act, the Clayton Act and the Federal Trade Commission Act shall not be applicable to the business of insurance in states where that business is regulated by state law. There was, however, a retention of federal jurisdiction in Section 3(b) to the effect that nothing in the McCarran Act shall prevent the applicability of the Sherman Act to any act or agreement of boycott, coercion or intimidation.

There is no question but that the State of New York regulates the business of insurance. See N. Y. Insurance Law and N. Y. Gen. Bus. Law § 340. Consequently, the *pro*

[1] Section 2(b) and Section 3(a) were amended on July 25, 1947 (61 Stat. 448) to extend the moratorium to June 30, 1948.

tanto repeal of the Sherman, Clayton and Federal Trade Commission Acts provided for in Section 2(b) is effective in New York and applicable to this case, subject only to the exceptions specified in Section 3(b) of the Act.

On July 7, 1955, Congress repealed Section 7 of the Sherman Act which, prior to that time, had provided for private treble damage actions for violations of the Sherman Act (69 Stat. 283 (1955)).

Defendant's Contentions.

Loyal contends "(1) that Section 2(b) of the McCarran Act repeals the Sherman and Clayton Acts with respect to the insurance industry to the extent that this industry has been regulated by State law; (2) that Section 3(b) of the McCarran Act makes only the Sherman Act applicable to cases involving boycott, coercion, or intimidation, despite the repeal effected by Section 2(b); (3) that Section 4 of the Clayton Act, which provides a private treble damage remedy, is not made applicable to boycott violations of the Sherman Act by Section 3(b) of the McCarran Act; (4) that Congress in repealing in 1955 Section 7 of the Sherman Act, which also provides a private treble damage remedy for Sherman Act violations, intended to confine suits under Section 3(b) of the McCarran Act to suits brought by the government, and to deprive private plaintiffs of the treble damage remedy and other civil remedies; and (5) that consequently since 1955 there has been no statutory basis for this court to award treble damages under Section 4 of the Clayton Act in actions based on Section 3(b) of the McCarran Act brought by private plaintiffs."

The apparent conflict between the lack of any jurisdictional basis in the Sherman Act for private treble damage actions alleging boycott in the insurance industry since the repeal of Section 7 and the continued applicability of the Sherman Act by virtue of Section 3(b) of the McCarran Act poses the jurisdictional issue in this case. The issue may be presented in three questions:

1. Does this court have jurisdiction under Section 3(b) of the McCarran Act?

2. Does Section 4 of the Clayton Act provide jurisdiction in spite of the Clayton Act's express inapplicability by the terms of Section 2(b) of the McCarran Act?

3. Absent jurisdiction under the specific provisions of the Sherman, Clayton and McCarran Acts, does this court have jurisdiction under 28 USC §§ 1331 and 1337?

I.

Jurisdiction under Section 3(b) of the McCarran Act.

The only method by which Section 3(b) of the McCarran Act would provide jurisdiction of this cause is if it adopted by its terms Section 7 of the Sherman Act and thus have given to Section 7 post-repeal efficacy.

1. Adoption.

It is well established that, absent a contrary intent of the legislature, the adoption or incorporation of a statute by reference is an adoption of the law as it existed at the time the adopting statute was enacted and is unaffected by any subsequent amendment or repeal of the statute adopted. *Hassett v. Welch*, 303 U. S. 303 (1938); *United States ex rel. Kessler v. Mercur Corp.*, 83 F. 2d 175 (2 Cir.), cert. denied 299 U. S. 576 (1936). See also Annot. 168 A. L. R. 627, Annot. 2 L. Ed. 2048. But at issue here is not the general rule nor any of its exceptions, but simply whether there was an adoption or incorporation by reference.

Whether there was or not is, of course, determined by the intent of the legislature. The starting point is the statute itself, which provides: "[n]othing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate or act of boycott, coercion, or intimidation." Is this an incor-

poration or adoption of the Sherman Act as it stood in 1945?

The language itself does not evidence an intent to adopt. This conclusion is supported by a comparison of the language in other cases where federal courts have held a statutory adoption. In each of these, the language itself evidenced a legislative intent to make the adopted statute an integral part of the adopting statute and rather than inserting a verbatim repetition of the adopted statute the legislative shorthand of incorporation by reference or adoption was employed.

Thus, in *Kendall* v. *United States*, 12 Pet. 524 (1838) one of the issues was the power of the then Circuit Court of the District of Columbia to issue the writ of mandamus to a public officer under the language "all powers by law vested in the circuit courts and the judges of the circuit courts of the United States." (2 Stat. 103 (1801)). The court held that the language quoted adopted the Act of February 13, 1801 (2 Stat. 89), notwithstanding its subsequent repeal on March 8, 1802. (2 Stat. 132 (1802)). See also *In re Heath*, 144 U. S. 92 (1892).

In *Hassett* v. *Welch*, 303 U. S. 303 (1938) the language "whether made, created, arising, existing, exercised or relinquished before or after the enactment of this Act" (Section 302(b) Int. Rev. Code of 1926) was held to have adopted the law as it existed prior to a 1931 amendment.

Similarly, in *United States ex rel. Kessler* v. *Mercur Corp.*, 83 F. 2d 178 (2 Cir.), cert. denied 299 U. S. 576 (1936), at issue was Rev. Stat. § 3490, which provided "who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty eight." The court held that notwithstanding the subsequent amendment and repeal of Rev. Stat. § 5438, the incorporating statute (Rev. Stat. § 3490) was to be read as if Rev. Stat. § 5438 was not amended or repealed. See also, *United States* v. *Rainwater*, 244 F. 2d 27 (8 Cir. 1957), aff'd 356 U. S. 590 (1958); *United States* v. *McNinch*, 242 F. 2d 359

(4 Cir.), modified, 356 U. S. 595 (1957); *United States ex rel. Boyd* v. *McMurtry*, 5 F. Supp. 515 (W. D. Ky. 1933); *Olson* v. *Mellon*, 4 F. Supp. 947 (W. D. Pa. 1933), aff'd *sub nom. United States ex rel. Knight* v. *Mellon*, 71 F. 2d 1021 (3 Cir.), cert. denied 293 U. S. 615 (1934).

In *Young* v. *United States*, 178 F. 2d 78 (9 Cir. 1949), cert. denied 339 U. S. 913 (1950), the language at issue was that of then 38 USC § 697: "Except as otherwise provided in this chapter, the administrative, definitive, and penal provisions under sections * * * 712-715 * * * of this title shall be applicable under this chapter." Again, the language of the incorporating statute made it clear that the incorporated statute was to become an integral part. In *United States* v. *Excel Packing Co.*, 210 F. 2d 596 (10 Cir.), cert. denied 348 U. S. 817 (1954), the language was equally clear: "Beef means meat graded as beef pursuant to the provisions of Distribution Regulation No. 2 * * *." And, in *Yarborough* v. *United States*, 230 F. 2d 56 (4 Cir.), cert. denied 351 U. S. 969 (1956), the court held incorporation by reference by the language "all provisions of law, including penalties, applicable with respect to the tax imposed by section 1400."

In this case, however, the exact converse is true. The language of Section 3(b) makes clear the Congressional desire that certain provisions of the Sherman Act were not to be part of the McCarran Act, but, rather, were to remain separate and apart. Section 3(b) of the McCarran Act was not an *adoption* of the Sherman Act. It merely provided that the Sherman Act should continue *applicable* to acts of boycott, coercion and intimidation if practiced in the insurance industry. Thus, by the McCarran Act, certain statutes were inapplicable to the insurance business while the applicability of the Sherman Act to the activities of boycott, coercion and intimidation was continued. This it seems is a far cry from adoption. The McCarran Act did not "adopt" any Act or any section.

This conclusion seems all but inescapable when reference is made to Section 4 of the McCarran Act, which provides: "Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance * * * the National Labor Relations Act, * * * the Fair Labor Standards Act * * * or the Merchant Marine Act * * *." The similarity of this language with that of Section 3(b) is remarkable.

The Congressional intent appears to have been the same. The Report of the Senate Judiciary Committee, commenting on what was to become Section 4 of the Act, stated:

> "Section 5 provides that the enactment of this Act shall not affect, in any manner, the present application of the National Labor Relations Act, or the Fair Labor Standards Act, to the business of insurance." S. Rep. 20, 79th Cong., 1st Sess. 3 (1945).

Similarly, with respect to what was to become Section 3(b) of the Act, both the Senate and House Reports noted:

> "(b) provides that at no time are the prohibitions in the Sherman Act against any act of boycott, coercion or intimidation suspended. These provisions of the Sherman Act remain in full force and effect." H. R. Rep. No. 143, 79th Cong., 1st Sess. (1945); S. Rep. No. 20, 79th Cong., 1st Sess. (1945).

There is no indication whatsoever that Congress in Section 4 intended to freeze the rights of those employed in the insurance business under the National Labor Relations Act or the Fair Labor Standards Act to the then-existing provisions. Such would be the complete antithesis of the Congressional desire.

The Congressional desire in both Sections 3(b) and 4 was the same; namely, to insure the continued applicability of certain federal legislation, notwithstanding the broad

language of Section 2(b). Neither was an adoption or incorporation by reference.

Reference, therefore, in the McCarran Act to the Sherman Act is not equivalent to adoption or incorporation. Obviously, reference may be made to laws other than for the purpose of incorporating or adopting the provisions of the law referred to. (See 82 C. J. S., Statutes § 71 at 125.) The limitations on the Sherman Act with respect to its applicability or non-applicability to the insurance business does not equal incorporation of that Act into the McCarran Act.

2. Repeal of Section 7 of the Sherman Act

At the time of the enactment of the McCarran Act in 1945, the existing Section 7 of the Sherman Act was as follows:

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the costs of suit including a reasonable attorneys' fee."

Section 7 of the Sherman Act was repealed by the Act of July 7, 1955 (69 Stat. 283). Since it was not adopted by the McCarran Act, the repeal ended its effectiveness. It should be noted that in its complaint, plaintiff does not mention Section 7 of the Sherman Act. Instead, it relies on (a) Section 1 of the Sherman Act (15 USC § 1); (b) Section 4 of the Clayton Anti-Trust Act (15 USC § 15); and (c) Section 3(b) of the McCarran Act (15 USC § 1013 (b)). (See par. 1 of complaint.)

It is my opinion, therefore, that Section 7 of the Sherman Act was repealed for all purposes and does not

survive by reason of any reference to the Sherman Act contained in the McCarran Act.

This construction of the McCarran Act does not render meaningless the reservation contained in Section 3(b). Under Section 3(b) the federal government may continue to prosecute both civil and criminal actions for acts of boycott, coercion and intimidation in the insurance industry under Sections 1, 2 and 4 of the Sherman Act, 15 USC §§ 1, 2 and 4.[2]

Because of these conclusions I am forced to disagree with the only other case dealing with this question, *Professional & Business Men's Life Ins. Co.* v. *Bankers Life Co.*, 163 F. Supp. 274 (D. Mont. 1958).[3] While the court in the *Professional* case held that there had been an adoption of Section 7 by Section 3(b) of the McCarran Act, it also noted that (1) diversity of citizenship existed (163 F. Supp. at 286); (2) the acts in question occurred prior to the effective repeal date of Section 7 of the Sherman Act and as to them Section 7 remains effective by virtue of 1 USC § 109; (3) the court stated that "there is no jurisdiction in this case by virtue of any provisions of the Clayton Act," and (4) "The Court experienced some doubt as to whether a private civil suit for treble damages was 'saved' by the exception to the McCarran Act contained in Section 3(b) thereof." 163 F. Supp. at 283.

[2] See, e.g., *United States* v. *Insurance Board of Cleveland*, 144 F. Supp. 684 (N. D. Ohio 1956) (boycotts) and 188 F. Supp. 949 (1960) (coercion and boycott); *United States* v. *New Orleans Insurance Exchange*, 148 F. Supp. 915 (E. D. La. 1957) (boycotts), aff'd 355 U. S. 22 (1957). See also *In re Grand Jury Investigation of the Aviation Insurance Industry*, 183 F. Supp. 374 (S. D. N. Y. 1960). For several unreported cases, see Dicks, A Federal Outlook, 18 Record Ass'n Bar N. Y. C. 184, 189 (1963).

[3] *California League of Independent Insurance Producers* v. *Aetna Cas. & Surety Co.*, 175 F. Supp. 857 and 179 F. Supp. 65 (N. D. Calif. 1959), related to sufficiency of pleading a boycott, etc., rather than the jurisdictional points raised by defendant here.

Accordingly, I conclude that Section 3(b) did not adopt or incorporate by reference Section 7 of the Sherman Act and, therefore, Section 3(b) provides no jurisdictional basis for the plaintiff's action.

II.

Jurisdiction Under Section 4 of the Clayton Act.

Section 4 of the Clayton Act, 15 USC § 15, provides jurisdiction and venue for violations of the "anti-trust laws" which by definition includes the Sherman Act, 15 USC § 12. The plaintiff contends that since Section 3(b) of the McCarran Act makes applicable Section 1 of the Sherman Act and jurisdiction is provided for Sherman Act violations under Section 4 of the Clayton Act, Section 4 of the Clayton Act provides jurisdiction since it does not "invalidate, impair, or supersede any law enacted by any State * * *."

The difficulties with this contention are twofold: first, it proceeds on an erroneous conclusion as to the Congressional intent, and, second, it violates the plain words of Section 2(b) of the McCarran Act.

The plaintiff's contentions proceed on the assumption that it was the Congressional intent only to invalidate those federal statutes which according to Section 2(b) of the McCarran Act "invalidate, impair, or supersede any [State] law." This is precisely what Congress' intention was not. Section 1 of the McCarran Act makes more than abundantly clear that Congress' intent was to allow "the continued regulation and taxation by the several States of the business of insurance" save only for those particular federal statutes expressly made applicable by Sections 3(b) and 4.

The second difficulty is that by the terms of Section 2(b) of the McCarran Act the Clayton Act is expressly rendered inapplicable to the business of insurance where state regulation exists. Section 3(b) saves from this exclusion only the

Sherman Act relating to boycotts, coercion or intimidation. If the plaintiff's construction were to be followed it would necessitate this court to judicially amend Section 3(b) to include the Clayton Act. Such a judicial rewriting is clearly not warranted.

It is true, as the plaintiff contends, that Section 7 of the Sherman Act was repealed in 1955 because Congress considered it surplusage in view of the broader provisions of Section 4 of the Clayton Act. The Senate Report (S. Rep. No. 619, 84th Cong., 1st Sess. (1955)) (to accompany H. R. 4954) states:

> "Since the Clayton Act's section 4 is more comprehensive, Section 7 of the Sherman Act is considered to be no longer necessary."

Similarly, H. R. Rep. No. 422, 84th Cong., 1st Sess. (1955) (to accompany H. R. 4954) states at page 2:

> "Section 3 of the bill repeals section 7 of the Sherman Act inasmuch as that section has long been superseded by section 4 of the Clayton Act. The two sections are virtually identical except that the latter provision authorizes private treble damage suits for violation of the antitrust laws as defined by section 1 of the Clayton Act, whereas the former statute authorizes such suits only for violations of the Sherman Act itself. At the present time, section 7 of the Sherman Act no longer appears in the United States Code and in prior compilations of Federal laws was considered as having been replaced by section 4 of the Clayton Act. Since the language in the proposed bill is broad enough, referring as it does to injuries 'by reason of anything forbidden in the antitrust laws', to make section 7 of the Sherman Act unnecessary, it is deemed advisable explicitly to repeal section 7 of the Sherman Act."

The legislative reasoning thus expressed appears to be that (1) Section 7 of the Sherman Act and Section 4 of the Clayton Act "are virtually identical except that the latter

provision authorizes private treble damage suits for violation of the antitrust laws as defined by section 1 of the Clayton Act, whereas the former statute authorizes such suits only for violations of the Sherman Act itself"; (2) that at the present time, Section 7 of the Sherman Act no longer appears in the United States Code and in prior compilations of Federal laws was considered as having been replaced by section 4 of the Clayton Act; (3) that "Since the language in the proposed bill is broad enough, referring as it does to injuries 'by reason of anything forbidden in the antitrust laws', to make section 7 of the Sherman Act unnecessary, it is deemed advisable explicitly to repeal section 7 of the Sherman Act."

Nowhere in the House Report, *supra*, the Senate Report, *supra*, the House Debates (101 Cong. Rec. 5129-5134 (1955)) or the Senate Debates (101 Cong. Rec. 9165-9166 (1955)) is there even a remote indication that the McCarran Act was considered or that the repeal was occasioned by a Congressional desire to preserve only governmental sanctions under Section 3(b) of the McCarran Act.

This court's function is not, however, to rewrite Section 3(b) to include the Clayton Act. This court must take the statute as it finds it and "[a]n omission at the time of enactment, whether careless or calculated, cannot be judicially supplied however much later wisdom may recommend the inclusion."[1]

Accordingly, Section 4 of the Clayton Act does not provide jurisdiction for the plaintiff's action.

III.

Jurisdiction Under 28 USC §§ 1331, 1337.

The plaintiff also seeks to premise jurisdiction on the existence of a federal question and the requisite amount, 28

[1] Frankfurter, Some Reflections on the Reading of Statutes, 47 Columb. L. Rev. 527, 534 (1947).

USC § 1331,[5] or on an act of Congress regulating commerce, 28 USC § 1337.[6]

The basis of any "arising under" jurisdiction is that the complaint, for jurisdictional purposes, must present a substantial claim having its source in and arising under a federal statute, *International Ass'n of Machinists* v. *Central Airlines Inc.*, ___ U. S. ___ (April 15, 1963), or to use the words of Justice Holmes: "A suit arises under the law that creates the cause of action." *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U. S. 257 (1916). See, generally, Hart & Wechsler, The Federal Courts and the Federal System, 763-69 (1953).

It is difficult to imagine a federal question arising under a federal statute, here the McCarran Act, which expressly declares its purpose to be to render inapplicable to a particular industry certain federal statutes. The plaintiff apparently realizes that and contends that, since under Section 3(b) the criminal provisions of the Sherman Act remain applicable to acts of boycott in the insurance industry, the existence of these criminal sanctions implicitly gives rise to a civil action for their violation, citing *Reitmeister* v. *Reitmeister*, 162 F. 2d 691 (2 Cir. 1947).[7]

In Reitmeister, Judge Learned Hand held that a civil action for violations of § 605 of the Federal Communications Act, 47 USC § 605, would lie, although the statute provided

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[5] 28 USC § 1331: "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

[6] 28 USC § 1337: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

[7] The plaintiff does not contend that the treble damage remedy of Section 7 of the Sherman Act or Section 4 of the Clayton Act is applicable, but simply that under this jurisdictional basis compensatory damages may be awarded.

no express provision for civil relief and imposed only criminal sanctions, stating, 162 F. 2d at 694:

> "* * * Although the Act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, *in the absence of contrary implications*, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal. * * *" (Emphasis supplied)

Here, the contrary implications are manifest. In the McCarran Act, Congress expressly limited violations of the Sherman Act to acts of boycott, coercion or intimidation. In 1955, when Congress repealed Section 7, it impliedly, although perhaps unwittingly, stated there was no longer to be any private civil remedies for violations of the Sherman Act in the insurance industry. There is, therefore, no jurisdiction of the plaintiff's cause under either 28 USC § 1331 or § 1337.

Conclusion.

Since Section 7 of the Sherman Act was repealed and not preserved by Section 3(b) of the McCarran Act (15 USC § 1013(b)) and since Section 4 of the Clayton Act (15 USC § 15) (although still *applicable* to Sherman Act offenses generally, i.e., *other* than insurance cases), is not applicable to the insurance industry under Section 3(b), I must conclude there is now no statute permitting a *private civil* action in the federal courts for acts or agreements of boycott in the insurance industry.

The net result is this:

1. The United States may still prosecute both criminal and civil actions under the Sherman Act for agreements to boycott, coerce or intimidate in the insurance business;

2. The federal courts under the Sherman Act do not have jurisdiction over private treble damage actions involving the insurance business (where state regulation exists) under the reservations of Section 3(b) of the McCarran Act (15 USC §.1013(b));

3. The plaintiff is relegated to the state courts for relief from boycott, etc. when the insurance business has been regulated by state law, as in New York.

By reason of the foregoing, the motion of defendant to dismiss for lack of jurisdiction of the subject matter is granted. Settle order on notice.

Dated: New York, N. Y.
May 8, 1963.

RICHARD H. LEVET
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of December one thousand nine hundred and sixty-three.

Present;

Hon. J. EDWARD LUMBARD,
Chief Judge,
Hon. IRVING R. KAUFMAN,
Hon. PAUL R. HAYS,
Circuit Judges.

MONARCH LIFE INSURANCE COMPANY,
Plaintiff-Appellant,

v.

LOYAL PROTECTIVE LIFE INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court with costs to the appellant.

A. DANIEL FUSARO,
Clerk

B 2

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 172—September Term, 1963.

(Argued November 14, 1963 Decided December 19, 1963.)

Docket No. 28412

MONARCH LIFE INSURANCE COMPANY,

Appellant,

—v.—

LOYAL PROTECTIVE LIFE INSURANCE COMPANY,

Appellee.

Before:

LUMBARD, *Chief Judge*, and
KAUFMAN and HAYS, *Circuit Judges*.

Appeal from a judgment of the District Court for the Southern District of New York, Richard H. Levet, *J.*, dismissing appellant's complaint for lack of jurisdiction over the subject matter.

Reversed and remanded.

JOHN W. CASTLES, 3D, New York, N. Y. (Wendell Davis, Jr., and Lord, Day & Lord of counsel), *for appellant*.

DONALD M. DUNN, New York, N. Y. (Robert R. Rich, Jr., Hamilton Fish, Jr., Thomas V. Heyman, and Alexander & Green, of counsel), *for appellee*.

KAUFMAN, *Circuit Judge*:

Simply stated, the sole issue presented by this appeal is whether a private treble-damage action is available for illegal boycotts in the insurance industry.

In the McCarran Act of 1945, 15 U. S. C. §§ 1011-15, Congress provided that the Sherman and Clayton Acts would be inapplicable to the business of insurance to the extent that the industry was regulated by state law. An exception was written into § 3(b) of the Act, however, to preserve the prohibitions of the Sherman Act, insofar as they related to boycotts and agreements to boycott. The present suit was instituted in the Southern District of New York by Monarch Life Insurance Company, and was based on allegations that defendant Loyal Protective Life Insurance Company had entered into an unlawful conspiracy to boycott Monarch in the sale and issuance of health and accident insurance in interstate commerce. Federal jurisdiction was invoked under § 1 of the Sherman Act, 15 U. S. C. § 1, which outlaws agreements to boycott; § 4 of the Clayton Act, 15 U. S. C. § 15, which authorizes private treble-damage relief for all violations of the antitrust laws; and § 3(b) of the McCarran Act, 15 U. S. C. § 1013. Reading the McCarran Act narrowly, the District Court held that the exceptive provisions of § 3(b) related only to the Sherman Act, and could not be construed to embrace the treble-damage provision of the Clayton Act. In view of New York's extensive regulation of the insurance industry, the Court concluded that there was no statutory foundation for a private treble-damage action, and accordingly dismissed the complaint for lack of jurisdiction. Alleging that the Court's restrictive interpretation had emasculated the purpose of § 3(b), Monarch has taken this appeal.

Prior to 1944, the issuance of an insurance policy was not thought to constitute "commerce" among the several states. *Hooper* v. *California*, 155 U. S. 648, 655 (1895); *New York Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495

(1913), and the insurance industry accordingly considered itself immune from federal antitrust regulation. See *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 414 (1946). In *United States* v. *Southeastern Underwriter's Ass'n*, 322 U. S. 533 (1944), the Supreme Court dispelled any such illusions by holding the Sherman Act applicable to a fire insurance company which conducted a substantial inter-state business. Congressional response to this ruling was swift, and the following year the McCarran Act was passed in an effort to clarify the respective roles of the federal and state governments in the regulation of the insurance industry.

The fundamental purpose of the Act was simply and clearly stated in its first section: "Congress hereby declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states." 15 U. S. C. § 1011. In furtherance of this general objective, § 2(b) of the Act provided that "[n]o act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U. S. C. § 1012. While thus disclaiming any federal intention to preempt the field of insurance regulation, Congress went on to provide that the Sherman, Clayton, and Federal Trade Commission Acts would "be applicable to the business of insurance to the extent that such business is not regulated by state law." *Ibid.*

§ 3(b) of the Act, the center of the present controversy, was designed to exclude one class of cases from this general scheme of accommodation to state regulation. Thus, Congress declared that "[n]othing contained in this Act shall render the * * * Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

In 1945, when the McCarran Act became law, § 7 of the Sherman Act provided a treble-damage remedy for private individuals injured by Sherman Act violations. In 1955, however, this section was repealed, 69 Stat. 283; as is more than clear from the legislative history, H. R. Rep. No. 422, 84th Cong., 1st Sess. 2 (1955), the repeal was merely designed to expunge a provision rendered superfluous by § 4 of the Clayton Act, which made the treble-damage remedy available to those injured by a violation of any antitrust law. Indeed, as both parties to the present appeal point out, § 7 had already become something of a dead letter in 1945. The provision was omitted from current editions of the United States Code, and the Clayton Act's § 4 had become the common vehicle for all private treble-damage actions, including those instituted for substantive Sherman Act violations.[1]

The District Court was, therefore, faced with a real dilemma. By its literal wording, § 3(b) saved only provisions of the Sherman Act from non-applicability in the presence of state regulation of the sale of insurance; by virtue of the 1955 repeal, the Sherman Act no longer contained a section providing for private treble damage actions; and the Clayton Act, upon which Monarch must

[1] § 4 of the Clayton Act has been codified as 15 U. S. C. § 15. A "historical note" appended to this section in the United States Code explains that 15 U. S. C. § 15 "applies to the provisions of this chapter generally and supersedes" § 7 of the Sherman Act which was "restricted in operation to the particular act cited." Both before and after the formal repeal of § 7 in 1955, litigants and courts alike would often cite this historical note, "15 U. S. C. § 15 note," as the statutory foundation for treble-damage actions instituted for substantive Sherman Act violations. See, e.g., *Boro Hall Corp.* v. *General Motors Corp.*, 124 F. 2d 822 (2d Cir. 1942), cert. den., 317 U. S. 695 (1942); *Tolman* v. *Cottage Woodcraft Shop*, 194 F. Supp. 83 (S. D. Cal. 1961). We interpret this practice as resting on an assumption that the treble damage provision of § 4 had, in effect, become part of the Sherman Act. While this in itself would be a sufficient answer to appellee's contentions, we prefer to rest our decision on the clearly expressed intention of Congress, to be discussed, *infra*.

depend for its treble-damage remedy, is, in the terms of § 2(b), applicable only "to the extent that (the business of insurance) is not regulated by state law."

Although recognizing that the only other court to consider the problem had reached a different result, *Professional & Business Men's Life Ins. Co. v. Bankers Life Co.*, 163 F. Supp. 274 (D. Mont. 1958), the district court reluctantly concluded that § 3(b) could not be construed to authorize a private treble-damage action, even when the substantive conduct alleged was a boycott illegal under the Sherman Act. The court noted that its interpretation would not render § 3(b) nugatory; the federal government might still maintain actions for § 3(b) violations. While we can understand the court's refusal to depart from what it deemed the clear meaning of a congressional enactment, we feel that a contrary interpretation would be more in harmony with congressional intent. We are constrained, therefore, to reverse the judgment of dismissal.

At the outset, we find ourselves unable to accept Loyal's contention that Congress did not contemplate the existence of a treble-damage remedy at the time the McCarran Act became law. In passing the McCarran Act, Congress was attempting to return primary responsibility for insurance regulation to the states; only when a state had not acted, would federal legislation become effective. § 3(b), on the other hand was designed to exempt certain types of cases from this general pattern of deference to state regulation; where boycotts, or agreements to boycott were concerned, the federal policy expressed through the Sherman Act was to be preeminent.

The congressional debates clearly manifest this purpose. Thus, Senator Ferguson, a co-sponsor of the bill, explained that "[t]here are certain things which a State cannot interfere with. It cannot interfere with the application of the Sherman Act to any agreement to boycott, coerce, or intimidate, or an act of boycotting, coercion or intimidation." 91 Cong. Rec. 1443 (1945). "[I]' other

words," the Senator continued, "under the terms of the bill, there are six things on which a state could not legislate. They are boycott, coercion, or intimidation, or agreements to boycott, coerce or intimidate." 91 Cong. Rec. 1481 (1945). In the words of Senator O'Mahoney, a Senate conferee on the bill, "the great gain which has been achieved by the complete agreement of the Senate and House conferees, [is that] agreements as well as acts of boycott, coercion and intimidation should be outlawed." 91 Cong. Rec. 1486 (1945).

At this day and age, an exhaustive citation of authorities is hardly necessary to establish the fundamental role of the private remedy in federal antitrust law enforcement. This was no less true in 1945; the private right of action for treble-damages then, as now, supplied much of the teeth behind the federal government's attempt to eliminate anti-competitive practices and to free our economic system from the devitalizing influences of monopoly. It seems especially significant, therefore, that when Congress acted in § 3(b) expressly to preserve federal power over a limited class of antitrust violations in the insurance industry, it gave absolutely no indication that it intended to abandon the remedy which was traditionally so vital to the effective enforcement of the federal right. In the absence of any articulated suggestion that so radical a step was contemplated, it may not be lightly inferred. And the fact that the treble-damage remedy of § 7 of the Sherman Act was still on the books at the time of enactment further reinforces our conclusion. For, even if private litigants may, as a matter of preference, have employed § 4 of the Clayton Act, this hardly indicates that the treble-damage remedy had become obsolescent. As of 1945, then, we are convinced that the private treble-damage remedy was available for § 3(b) violations since § 7 was still contained in the Sherman Act, even the most literal reader of the McCarran Act would be compelled to such a conclusion.

We are left with the question whether the 1955 repeal of § 7 carried with it the drastic consequences with respect to § 3(b) which Loyal urges. We cannot believe that it did. Congressional intention that the repeal be merely a housekeeping measure, designed to remove duplication, while leaving substantive rights undisturbed, was made abundantly clear on several occasions. Indeed, we find it inconceivable that Congress would radically alter the general pattern of antitrust law enforcement in such a roundabout, indirect and unobtrusive manner.

It is axiomatic that statutes are to be interpreted, whenever possible, to effectuate their underlying purpose and intention. *United States* v. *Bryan*, 339 U. S. 323, 338 (1949); *Cawley* v. *United States*, 272 F. 2d 443, 445 (2d Cir. 1959). And the English language is seldom so explicit that it may be interpreted in a vacuum. Thus Corbin has warned that a "word, appearing suddenly, in empty space and with no history, would express nothing at all. To be expressive of any meaning, all words must have a context and a history * * *" 3 Corbin, Contracts 90 (1960).

As he did in so many areas, Judge Learned Hand illuminated the proper method of statutory interpretation in language which bears continued reflection. In *Cabell* v. *Markham*, 148 F. 2d 737, 739 (2d Cir.), aff'd, 326 U. S. 404 (1945), he wrote that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning." And in a speech delivered before the Massachusetts Bar Association in 1942, reprinted in "The Spirit of Liberty," Judge Hand considered the problems presented to a court confronted with a statute which requires interpretation. With his customary eloquence he stated that "[t]he duty of ascertaining its meaning is difficult at best, and one certain way of missing it is by read-

ing it literally, for words are such temperamental beings that the surest way to lose their essence is to take them at their face. Courts must reconstruct the past solution imaginatively in its setting and project the purposes which inspired it upon the concrete occasions which arise for their decision."

When the language of § 3(b) is examined in the light of our understanding of congressional purpose, we do not find ourselves driven to adopt an interpretation which flies in the face of the meaning intended by Congress. The statutory wording of § 3(b) provides that "nothing contained in this act shall render * * * the Sherman Act inapplicable to any agreement to boycott." Since we find the treble-damage provision of the Clayton Act so basic to the effective enforcement of the Sherman Act, we feel that the interpretation adopted below *would* severely impair the applicability of the Sherman Act to "any agreement to boycott," despite the continued availability of governmental sanctions, both civil and criminal.[2] We would, accordingly, read the statute as intended to exclude certain forms of conduct—and not merely certain statutory sections—from the general pattern of deference to state legislation. Under our interpretation, all boycotts or agreements to boycott condemned by the Sherman Act are rendered subject to federal law; as the treble-damage provision of

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[2] It has been argued that the government would still be free to impose civil and criminal sanctions for § 3(b) violations, but we find this insufficient. As the Court of Appeals for the Ninth Circuit has said, the "broad scope of the antitrust laws was part of the legislative scheme 'intended in the most comprehensive way to provide against combinations or conspiracies in restraint of trade or commerce' * * * The Clayton Act was part of the overall plan and the 'right of the injured party to recover damages was intended to provoke greater respect for the Act * * *.' The treble damage action was intended not merely to redress injury to an individual through the prohibited practices, but to aid in achieving the broad social object of the statute.'" *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F. 2d 358, 365 (9th Cir. 1955). See also *United States* v. *Standard Ultramarine & Color Co.*, 137 F. Supp. 167, 171 (S. D. N. Y. 1955).

the Clayton Act is a significant part of that law, it remains applicable to all such conduct.

The complaint in the present suit alleges that Loyal and a former employee of Monarch conspired to boycott Monarch in the sale and issuance of health and accident insurance. While we express no opinion as to the merits of the claim, an agreement to boycott has clearly been alleged. Accordingly, we hold that Monarch was improperly denied the opportunity to prove that it was injured by conduct violative of the Sherman Act, and we reverse the judgment of dismissal, and remand the case for further proceedings.

Reversed and remanded.

APPENDIX C

Sherman Act.

§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (15 U. S. C. § 1)

§ 7. Any person who shall be injured in h[illegible] business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (26 Stat. 210)

Clayton Act.

§ 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (15 U. S. C. § 15)

McCarran-Ferguson Act.

§ 1. Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States. (15 U. S. C. § 1011)

§ 2.(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business. (15 U. S. C. § 1012(a))

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which

imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law. (15 U. S. C. § 1012(b))

§ 3.(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof. (15 U. S. C. § 1013(a))

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation. (15 U. S. C. § 1013(b))

§ 4. Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920. (15 U. S. C. § 1014)

1955 Repeal of Section 7 of the Sherman Act.

69 Stat. 283 (1955): Section 7 of the Act approved July 2, 1890 (26 Stat. 210), is repealed.

NEW YORK GENERAL BUSINESS LAW

§ 340. Contracts or agreements for monopoly or in restraint of trade illegal and void

1. Every contract, agreement, arrangement or combination whereby

A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby

Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby

For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void.

2. Subject to the exceptions hereinafter provided in this section, the provisions of this article shall apply to licensed insurers, licensed insurance agents, licensed insurance brokers, licensed independent adjusters and other persons and organizations subject to the provisions of the insurance law, to the extent not regulated by provisions of article eight of the insurance law; and further provided, that nothing in this section shall apply to the marine insurances, including marine protection and indemnity insurance and marine reinsurance, exempted from the operation of article eight of the insurance law.

3. The provisions of this article shall not apply to cooperative associations, corporate or otherwise, of farmers, gardeners, or cairymen, including live stock farmers and

fruit growers, nor to contracts, agreements or arrangements made by such associations, nor to bona fide labor unions.

4. The labor of human beings shall not be deemed or held to be a commodity or article of commerce as such terms are used in this section and nothing herein contained shall be deemed to prohibit or restrict the right of workingmen to combine in unions, organizations and associations, not organized for the purpose of profit.

5. An action to recover damages caused by a violation of this section must be commenced within four years after the cause of action has accrued. This limitation shall not apply to any suit which has been commenced within one year after the effective date of this act. At or before the commencement of any civil action by a party other than the attorney-general for a violation of this section, notice thereof shall be served upon the attorney-general.

Office-Supreme Court, U.S.
FILED
FEB 27 1964
JOHN F. DAVIS, CLERK

No. 796

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

LOYAL PROTECTIVE LIFE INSURANCE COMPANY,

Petitioner,

v.

MONARCH LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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February 26, 1964.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 796.

LOYAL PROTECTIVE LIFE INSURANCE COMPANY,

Petitioner,

v.

MONARCH LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the District Court (App. A of Petition) is reported at 217 F. Supp. 210. The opinion of the Court of Appeals for the Second Circuit. (App. B. of Petition) is unreported.

Jurisdiction.

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. §1254(1).

Question Presented.

The sole question presented is whether the private treble damage remedy is available for an illegal boycott in the insurance business.

Statutes Involved.

The pertinent provisions of Section 1 of the Sherman Act, 15 U. S. C. §1; Section 7 of the Sherman Act, 26 Stat. 210; Act of July 7, 1955, repealing Section 7 of the Sherman Act, 69 Stat. 283; Section 4 of the Clayton Act, 15 U. S. C. §15, and Sections 1-4 of the McCarran Act, 15 U. S. C. §§1011-1014 are set forth in Petition Appendix C.

Statement.

(a) The Complaint.

Monarch Life Insurance Company (hereinafter "Monarch") has filed a complaint in the District Court for the Southern District of New York against petitioner Loyal Protective Life Insurance Company (hereinafter "Loyal") alleging damages suffered as a result of an insurance boycott in violation of Section 1 of the Sherman Act (Record pp. 1-12). The complaint demands treble damages under Section 3(b) of the McCarran Act and under Section 4 of the Clayton Act.

(b) The Motion to Dismiss.

Loyal has moved to dismiss the complaint for lack of jurisdiction over the subject matter, on the ground that the treble damage remedy is not available for boycotts in the insurance business. (Record pp. 21-40).

(c) Opinion of the District Court.

The District Court granted Loyal's motion to dismiss for lack of jurisdiction, holding: (1) that Section 2(b) of the McCarran Act provided that the Sherman Act, the Clayton Act, and the Federal Trade Commission Act shall not be applicable to the business of insurance in states where that business is regulated by state law, and that the applicable state, New York, did regulate the business of insurance, resulting in the "repeal of the Sherman, Clayton and Federal Trade Commission Acts". (Petition App. A pp. 4-5); (2) that Section 3(b) of the McCarran Act preserved from the effect of section 2(b) only the Sherman Act, in cases of boycott, coercion or intimidation, but did not preserve the treble damage provision of the Clayton Act (Id. pp. 12-13); and (3) that on the repeal in 1955 of the treble damage remedy found in Section 7 of the Sherman Act, Congress "impliedly, although perhaps unwittingly, stated there was no longer to be any private civil remedies for violations of the Sherman Act in the insurance industry." (Id. p. 16). The District Court further held that Section 7 of the Sherman Act was not saved from repeal in 1955 by its adoption by Section 3(b) of the McCarran Act in 1945 (Id. pp. 6-10).

(d) Opinion of The Court of Appeals.

The Court of Appeals reversed the judgment of the District Court and held that the private treble damage remedy under Section 4 of the Clayton Act was available for insurance boycotts in violation of Section 1 of the Sherman Act. Noting that Section 3(b) of the McCarran Act provides that:

> "[n]othing contained in this act shall render * * * the Sherman Act inapplicable to any agreement to boycott,"

the Court held that the construction adopted by the District Court "*would* severely impair the applicability of the Sherman Act to 'any agreement to boycott' ". (Petition App. B p. 9). The Court held, in effect, that under Section 3(b) of the McCarran Act the treble damage provision of Section 4 of the Clayton Act was preserved, because it was necessary in order to give full effect to the boycott prohibitions of Section 1 of the Sherman Act. The Court based its construction of Section 3(b) of the McCarran Act on the following factors: (1) legislative history shows that in enacting the McCarran Act in 1945 Congress intended the treble damage remedy to be available for insurance boycotts (Id. p. 6); (2) the private treble damage remedy has a "fundamental role" in Federal antitrust law enforcement (Id. p. 7); (3) Congress could not possibly have intended to eliminate the treble damage remedy for insurance boycotts in enacting the McCarran Act in 1945, because the treble damage provision found in Section 7 of the Sherman Act was then in effect (Id. p. 7); (4) the repeal of Section 7 of the Sherman Act in 1955 was "designed to remove duplication" with Section 4 of the Clayton Act, "while leaving substantive rights undisturbed" (Id. p. 8); and (5) Section 3(b) was "intended to exclude certain forms of conduct [i.e., boycott, coercion and intimidation]—and not merely certain statutory sections—from the general pattern of deference to state legislation." (Id. p. 9).

Holding as it did that all Federal law necessary to give effect to the boycott prohibitions of the Sherman Act was to be preserved, it was unnecessary for the Court of Appeals to review those portions of the District Court's opinion which held: (1) that Section 2(b) of the McCarran Act "repealed" the Clayton Act insofar as it applied to the insurance business; (2) that McCarran Act 3(b) did not

adopt Section 7 of the Sherman Act so as to preserve it from repeal in 1955; and (3) that it had no jurisdiction under 28 U. S. C. §§1331, 1337 to award compensatory damages for a violation of Section 1 of the Sherman Act.

ARGUMENT.

I.

The decision of the Court of Appeals below is clearly correct.

Loyal's entire position is based on the asserted failure of Section 3(b) of the McCarran Act to preserve the applicability of the treble damage provision of Section 4 of the Clayton Act. The Court of Appeals held, however, that it was unnecessary for the McCarran Act Section 3(b) to refer specifically to any remedial provision, because Section 3(b) was "intended to exclude certain forms of conduct—and not merely certain statutory sections—from the general pattern of deference to state legislation." Only the Sherman Act was mentioned because, in the opinion of the framers of this provision, the Sherman Act was the only anti-trust law forbidding boycotts, coercion and intimidation. It is not contended that Clayton Act §4 forbids boycotts, coercion or intimidation, and therefore there was no reason for McCarran Act §3(b) to refer specifically to this remedial provision. The following considerations demonstrate conclusively the correctness of this construction of Section 3(b).

(1) The history of the treble damage remedy shows that it is an essential feature of anti-trust enforcement. Senator Sherman himself emphasized the importance of the private remedy for anti-trust enforcement in 1890 when he stated:

> "[I]t is important to citizens that they should have some remedy in a court of general jurisdiction in the United States to sue for and recover the damages they have suffered. I think myself the rule of damages is too small * * *. Very few actions will probably be brought, but the cases that will be brought will be by men of spirit, who will contest against these combinations." 21 Cong. Rec. 2569 (1890).

At the time of the enactment of the Clayton Act, Rep. Webb, one of the House Managers, in referring to section 4, stated:

> "That * * * will have a more deterrent effect on the men who practice those things than a mere criminal penalty, and we all know that the disinclination of juries in some quarters to convict men under these criminal sections has resulted in their acquittal." 51 Cong. Rec. 16274 (1914).

This Court has on many occasions taken notice of the importance of the treble damage remedy to antitrust enforcement. See *e.g.*, *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165, 174 (1915); *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 751 (1947); *Radovich* v. *National Football League*, 352 U. S. 445 (1957). As noted by the Court of Appeals below, "[a]t this day and age, an exhaustive citation of authorities is hardly necessary to establish the fundamental role of the private remedy in Federal antitrust law enforcement" (Petition App. B., p. 7).

(2) In enacting McCarran Act §3(b) in 1945 Congress intended to preserve the full panoply of anti-trust remedies for a boycott violation of the Sherman Act. Not only had Congress consistently recognized the importance of the treble damage remedy as a factor in the enforcement of the

anti-trust laws on many occasions since 1890, but the legislative history attending the enactment of the McCarran Act in 1945 conclusively shows that Congress intended the treble damage remedy to be available to vindicate a boycott violation of the Sherman Act. H. R. Rep. No. 143, 79th Cong., 1st Sess. (1945), in referring to the provision of S. 340 which later became Section 3(b) of the McCarran Act, stated at p. 3 that this provision:

> "* * * provides that at no time are the prohibitions in the Sherman Act against any act of boycott, coercion, or intimidation suspended. These provisions of the Sherman Act remain in full force and effect."

Clearly these provisions could not possibly be in full force and effect if there were no longer available a private remedy to enforce the provisions. It would be absurd to conclude that Congress has stripped from the remedies available to vindicate what it regarded as the most serious violation of the Sherman Act (cases of boycott, coercion and intimidation) the private remedies of treble damages and the injunction. The statement of the House Managers appended to H. R. Rep. 215, 79th Cong., 1st Sess. (1945) stated that section 3(b) made clear:

> "[t]he intention of the Congress that the acts of boycott, coercion, and intimidation are subject to the operation of the *suspended statutes* even during the moratorium period." (Emphasis added.)

The moratorium period was the three year period from 1945 to 1948, referred to in section 3(a), which was adopted to give the states time to regulate the insurance business before the anti-trust acts were applied to the insurance business. Since the Clayton Act was one of the "suspended

statutes" referred to in section 3(a), this quoted statement makes clear the understanding of the House Managers of the McCarran Act that section 3(b) preserved the Clayton Act as well as the Sherman Act, in cases of boycotts, coercion and intimidation, even during the moratorium period. If Congress understood that the Clayton Act was to be preserved even during the moratorium period, then *a fortiori* it would be preserved after the moratorium.

(3) The availability of the treble damage remedy provided by Sherman Act §7 demonstrates that Congress could not have intended to eliminate the treble damage remedy in cases of insurance boycott violations on the enactment of McCarran Act §3(b) in 1945. Loyal contends (Petition p. 9) that in 1945 Congress had eliminated the treble damage remedy for insurance boycott violations of the Sherman Act and (id. p. 10) that the "language of the entire Act clearly negatives any suggestion that Congress intended to afford private litigants such a remedy—even in 1945 before Section 7 of the Sherman Act was repealed." The fact is that Section 7 of the Sherman Act was in effect in 1945 and that the treble damage remedy was available for boycotts in the insurance industry even after the McCarran Act was enacted. If Congress intended to eliminate the treble damage remedy for insurance boycotts in 1945, the language it chose to effectuate that intention was singularly ineffective, for no court has yet suggested that the treble damage remedy was not available prior to 1955. Although the Sherman Act §7 was in effect in 1945, it was completely duplicated by Clayton Act §4, which provided a treble damage remedy for violations of all of the antitrust laws, including the Sherman Act. The fact that Section 7 of the Sherman Act was still in effect in 1945

shows conclusively that Congress could not have intended at that time to eliminate the treble damage remedy for an insurance boycott violation.

Thus, Loyal's entire position comes down to the proposition that everything was changed in 1955 when Section 7 of the Sherman Act was repealed. The legislative history of this repeal, cited *infra*, shows conclusively that this repeal was intended for no other purpose than to eliminate duplication with Section 4 of the Clayton Act, and could not have been intended to deprive private litigants of their treble damage remedy.

Although Sherman Act §7 was in effect in 1945, both Loyal and Monarch had pointed out to the Court of Appeals that it had "already become something of a dead letter in 1945" (Petition App. B, p. 5). This fact certainly suggests that if in 1945, Congress intended to do what it did in fact do—preserve the treble damage remedy for insurance boycotts—then if intended to do this through the instrumentality of the only treble damage provision appearing in the United States Code and generally in use, Section 4 of the Clayton Act.

(4) The dividing line between state and federal regulation of insurance under the McCarran Act is based on the conduct involved rather than the statutes involved. As noted by the Court of Appeals below (Petition App. B, p. 4) the McCarran Act was the Congressional response to the decision of this Court in *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533 (1944) that the insurance industry was subject to federal anti-trust regulation. The purpose of the McCarran Act, made clear by §§1 to 3, is to define the dividing line between the state and federal spheres of regulation of the insurance industry. In general, state regulation was to control, but

in the case of boycott, coercion and intimidation federal law was to control. Section 3(b) mentions only the Sherman Act, rather than "federal law", because the Sherman Act is the only anti-trust law which prohibits boycott, coercion and intimidation. This fact was certainly known to the Congress, because in January, 1945 Senator Ferguson, one of the co-sponsors of the bill, in referring to Section 3(b), noted that:

> "[T]he Sherman Act is the only act which relates to boycott, coercion, or intimidation." (91 Cong. Rec. 479 (1945))

It was necessary for the framers of the McCarran Act 2(b) to refer to the Clayton Act, because Sections 2, 3, 7, 8 and 10 of the Clayton Act are substantive provisions which proscribe certain conduct. Section 4 of the Clayton Act is unlike these provisions, since it is not regulatory in nature but merely provides the treble damage remedy. The Court of Appeals was therefore entirely correct in concluding that for an insurance boycott violation of the Sherman Act all federal remedies are available, including the treble damage remedy found in Clayton Act 4. (Petition App. B, pp. 9-10).

(5) Conceding as it must that the treble damage remedy remained in effect for insurance boycott violations at least until 1955, Loyal argues, as it must, that in 1955 everything was changed by the repeal of Section 7 of the Sherman Act. The legislative history attending the repeal of Section 7 of the Sherman Act, however, makes absolutely clear that the legislative intent was merely to eliminate a duplicatory treble damage provision. The House Committee Report stated:

> "Section 3 of the bill repeals section 7 of the Sherman Act inasmuch as that section has long been

> superseded by section 4 of the Clayton Act. The two sections are virtually identical except that the latter provision authorizes treble damage suits for violation of the antitrust laws as defined by section 1 of the Clayton Act, whereas the former statute authorizes such suits only for violations of the Sherman Act itself. At the present time, section 7 of the Sherman Act no longer appears in the United States Code and in prior compilations of Federal laws was considered as having been replaced by section 4 of the Clayton Act" (H. R. Rep. No. 422, 84th Cong., 1st Sess. 2 (1955)).

See also S. Rep. No. 619, 84th Cong., 1st Sess. (1955). Even the District Court below conceded that this was the only reason for the repeal of section 7, for it stated:

> "It is true, as the plaintiff contends, that Section 7 of the Sherman Act was repealed in 1955 because Congress considered it surplusage in view of the broader provisions of Section 4 of the Clayton Act." (Petition App. A p. 13)

To hold that the repeal of Section 7 of the Sherman Act in 1955 deprived private litigants of their treble damage remedy for insurance boycotts is clearly to give to this repeal an effect that Congress did not expect and could not have intended. Nevertheless, the District Court below concluded (Petition App. A p. 16):

> "In 1955, when Congress repealed Section 7, it impliedly, although perhaps unwittingly, stated there was no longer to be any private civil remedies for violations of the Sherman Act in the insurance industry."

This Court has held on numerous occasions that a statute should not be so construed as to lead to an unexpected or absurd result. *Ozawa* v. *United States*, 260 U. S. 178,

194 (1922); *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 543 (1940); *United States* v. *Bryan*, 339 U. S. 323, 338 (1950). In *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534 this court stated at p. 543:

> "Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has lead to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed the purpose rather than the literal words."

This rule has even been applied to the construction of a repealing statute. In *United States* v. *One 1955 Ford Sedan*, 164 F. Supp. 729 (D. Md. 1958), it was stated at p. 735:

> "In construing repealing statutes, it has frequently been held that a literally expressed repeal of a statute will not prevail where the intention of the legislative body is satisfactorily shown to be to the contrary."

In view of this clear legislative history of the repeal of Section 7 of the Sherman Act in 1955, and in view of the previous decisions of this Court, the Court of Appeals below was clearly correct in holding (Petition App. B, p. 8) that the repeal was merely a housekeeping measure and that it is inconceivable that Congress "would radically alter the general pattern of antitrust law enforcement in such a round-about, indirect and unobtrusive manner."

(6) The decision of the Court of Appeals below can also be upheld on a ground upon which the court did not find it necessary to pass. Loyal's entire position is based on the proposition that Section 2(b) of the McCarran Act exempted the insurance industry from the application of the entire Clayton Act, and specifically section 4. (Petition pp. 9-10). The fact is that section 2(b) does nothing of the sort. Section 2(b) provides only that "no act of Congress shall be construed to invalidate, impair or supersede" any state insurance tax or regulation. Since Section 4 of the Clayton Act is merely a remedial provision, it is difficult to see how it can possibly conflict with state law. It neither allows, prohibits, nor regulates any conduct. Section 1 of the Sherman Act may possibly conflict with state law, but this provision is clearly saved by McCarran Act §3(b). The treble damage remedy itself does not conflict with state law, and therefore was not made inapplicable by McCarran Act Section 2(b). It would be absurd to contend that application of the treble damage remedy to this lawsuit would invalidate, impair, or supersede the application of the New York insurance laws to the facts on which this controversy is based.

The proviso to Section 2(b) of the McCarran Act in terms simply makes applicable to the business of insurance three statutes which might have been rendered inapplicable by the principal clause of the section. From the plain meaning of the statute it is clear therefore that no provision ever rendered Section 4 of the Clayton Act inapplicable to the business of insurance.

II.

There is no conflict of decision or important question of federal law.

In the period of almost nine years since the repeal of Section 7 of the Sherman Act in 1955, apart from the present litigation, there has been only one reported decision on the question of whether the private treble damage remedy is available for an illegal boycott in the insurance business. In *Professional and Businessmen's Life Ins. Co.* v. *Bankers Life Co.*, 163 F. Supp. 274 (D. Mont. 1958), the Court held that the treble damage remedy was so available, although its decision was based on a different ground from that on which the decision of the Court of Appeals in the present case is based. In one other case, *California League of Independent Insurance Producers* v. *Aetna Cas. & Surety Co.*, 175 F. Supp. 857 and 179 F. Supp. 65 (N. D. Cal., 1959), the complaint sought treble damages for an insurance boycott under Section 3(b) of the McCarran Act. The Court denied the defendant's motion to dismiss for insufficiency of pleading of a boycott. As far as appears from the court's opinions the defendant did not make the technical objection to jurisdiction made by Loyal in the present case. Since the decision of the District Court in the present action has been reversed, there is therefore no conflict between any jurisdictions on the question for which Loyal now seeks review.

This issue on which Loyal now seeks the review of this Court is a narrowly limited one, namely, whether the treble damage remedy is available for insurance boycotts. Loyal does not, and cannot claim that the insurance business has an immunity to the boycott prohibitions of Section 1 of the Sherman Act. Moreover, Loyal does not, nor can it, claim

that the government lacks the power to punish an insurance boycott violation of Section 1 of the Sherman Act under power conferred by Section 1 itself, or to enjoin such a violation under Section 4 of the Sherman Act. Consequently, Loyal raises no issue as to the dividing line between state and federal regulation of the insurance business.

Since the decision of the Court of Appeals below is clearly correct, Loyal's petition for certiorari should be denied.

Conclusion.

For the foregoing reasons, it is respectfully submitted that Loyal's petition for a writ of certiorari should be denied.

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Respectfully submitted,

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